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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 500

R. A. HOLMAN & CO., INC., *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Dated: September 27, 1963.

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SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Securities and Exchange Commission, William L. Cary, et al.*

v. *R. A. Holman & Company, Inc.*, entered June 13, 1963, and the denial of petitioner's motion for rehearing on August 1, 1963.

OPINIONS BELOW

On July 6, 1962, the United States District Court for the District of Columbia issued a preliminary injunction against the defendant Securities and Exchange Commission and the individual members of the Commission named as defendants in the Complaint. The order is printed in Appendix A, pp. 1a-3a, *infra*. No written opinion was handed down. On June 13, 1963, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court in an opinion which is not yet reported, and which is also printed in Appendix A at pp. 4a-9a, *infra*. Petitioner, R. A. Holman & Co., Inc., petitioned for rehearing *en banc* which was denied by the United States Court of Appeals for the District of Columbia Circuit on August 1, 1963. (See p. 4a, *infra*.) The order denying the petition for rehearing *en banc* states that Circuit Judge Wilbur K. Miller would have granted the petition for rehearing (*ibid.*).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction under 28 U.S.C. §§ 1292(a)(1) and 1294(1). Its judgment was entered on June 13, 1963, and a timely petition for rehearing was filed on June 28, 1963. This was denied by the Court of Appeals below on August 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Also involved is Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c).

QUESTIONS PRESENTED

1. Whether a United States District Court has equitable jurisdiction to prevent substantial and irreparable injury to a party occasioned by the denial of fundamental procedural due process in an administrative proceeding.

2. Whether the exercise of equitable jurisdiction by a district court is precluded by an agency's formal denial in its pleadings filed in the court of the facts on which the claim for equitable relief is based.

STATEMENT OF THE CASE

The decision below involved an appeal from a preliminary injunction issued on July 6, 1963, by Judge Hart of the United States District Court for the District of Columbia against the further conduct of certain proceedings before the Securities and Exchange Commission to which R. A. Holman & Co., petitioner herein, was a party. This injunction directed the Commission to show cause by September 5, 1963, why a permanent injunction should not be entered, but it also provided that the Commission could make sufficient response to this show cause order by instituting an evidentiary hearing to determine whether or not any Commissioner should be disqualified from participating in the Commission's proceedings involving peti-

tioner; and by making a report of its determination to the District Court.

This injunction was in the same form as the injunction ordered by the United States Court of Appeals for the District of Columbia Circuit in *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F. 2d 260 (D.C. Cir. 1962), petition for a rehearing denied June 14, 1962. In that case, the Court of Appeals had held that such relief was warranted on the ground that it was a "fundamental" denial of due process for a person who has acted in an investigatory or prosecutory capacity on a matter, as an official of the Commission's staff, thereafter to act in a quasi-judical capacity in the same or factually related matter, as a member of the Commission.

As in the *Amos Treat* case, in the case below; petitioner had challenged the authority of one of the Commissioners to participate in decisions in an Agency's formal proceeding against it, in view of that Commissioner's prior participation in the investigation of the subject matter of the proceedings while it was under Commission investigation.

Specifically, Commissioner Byron D. Woodside had served on the Commission's staff as Director of the Commission's Division of Corporation Finance from April 1, 1960 to July 15, 1960. On March 30, 1960, the Pearson Corporation filed with this Division a registration statement, under Commission Regulation A, covering the issue of common stock to the public; petitioner was designated as underwriter of this issue. In April 1960, and while Commissioner Woodside was Director, the Division of Corporation Finance began its examination of this registration statement and commenced making inquiries concerning the information

included in the statement. Petitioner's verified complaint filed below specifically alleged that the Division had commenced an informal investigation of this matter while Commissioner Woodside was director.[1]

On September 16, 1960, after Commissioner Woodside had become a member of the Commission, as a result of this investigation the Commission issued an order charging, *inter alia*, certain irregularities in a previous registration statement covering a distribution of Pearson shares of which petitioner was also underwriter. Shortly thereafter, on September 26, 1960, on the basis of the same charges, the Commission also instituted proceedings against R. A. Holman & Co. to revoke its broker-dealer registration. The proceedings against Pearson Corporation and petitioner were consolidated by the Commission on the ground that they involved common questions of law and fact.[2]

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[1] In the proceeding below, the Commission referred to the review by the Division of Corporation Finance of the registration statement as an "examination." However, it should be noted that in its petition for rehearing *en banc* to the Court of Appeals for the District of Columbia in *Amos Treat & Co.* v. *Securities and Exchange Commission*, *supra*, the Commission stated (p. 11, note 8): "In a sense an examination of each registration statement might be considered an informal investigation."

[2] We note that the Commission's order of September 16, 1960, initiating the proceedings against Pearson was involved in the prior court proceedings brought by R. A. Holman & Co. against the Securities and Exchange Commission. In that case the Court of Appeals for the District of Columbia sustained the Commission's right to promulgate rules which presently deny R. A. Holman & Co. the right to engage in Regulation A offerings on the basis of ex parte charges prior to being accorded a hearing, despite the conceded extensive and irremedial damage to its business caused by this action. *R. A. Holman & Co.* v. *Securities and Exchange Commission*, 299 F. 2d 127, (D.C. Cir. 1962), *cert. denied* 370 U.S. 911 (1962).

In the verified complaint filed below, petitioner alleged that Commissioner Woodside, when Director of the Division of Corporation Finance, was responsible for the Division's initiation, conduct and supervision of the investigation against the petitioner; that in this capacity he participated in the investigation and thereby acquired substantial knowledge of the facts in issue. Petitioner also contended below that this investigation triggered the institution of proceedings against petitioner.

In its answer filed below the Commission conceded that as the director of the Division, Commissioner Woodside had "ultimate responsibility to the Commission for the work of this Division" (JA 64). It denied Commissioner Woodside's participation in the investigation relating to petitioner or that he possessed any knowledge of the facts by reason of this investigation (JA 64), but notably, no affidavit was submitted by Commissioner Woodside concerning his participation even though he is an individual defendant in the suit.[1] Moreover, in its pleadings filed with the District Court in another case, the Commission has specifically acknowledged that this proceeding stemmed from charges resulting from the examination of the registration statement filed March 30, 1960, by the Division of Cor-

[1] An affidavit was submitted by the Assistant Director of the Division in which he alleged merely that he did not "discuss" the matter with Commissioner Woodside (JA 131-132). However, the Assistant Direct admits that he supervised the examination of the Pearson registration statement, and he was Commissioner Woodside's immediate subordinate in that Division (JA 29-32). Moreover, the statement was on file for three and a half months while Commissioner Woodside was Director of the Division (JA 63, 64). Inasmuch as time is of the essence in making these statements effective, only a statement with unusual and noteworthy problems would have remained ineffective for so long a period.

poration Finance (JA 9, 63). In granting the preliminary injunction, the District Court made the specific finding that Commissioner Woodside had been responsible for the processing of the Pearson registration statement of March 30, 1960 (p. 1a, *infra*), and admittedly it was this statement which precipitated the investigation.

Petitioner first learned of Commissioner Woodside's participation in the administrative proceedings below under the following circumstances:

Since the commencement of the Commission's proceedings against petitioner, the Commission has entered a number of rulings on interlocutory appeals and other matters relating to the proceedings against petitioner without identification of the names of the commissioners who participated in these rulings. On April 7, 1961, petitioner requested from the Commission the names of the commissioners who were participating in the proceedings, but this request was denied.

Finally, on May 28, 1962, the Commission issued a memorandum order denying a motion of substantial importance to the petitioner concerning the proceeding. The memorandum order recited for the first time the names of the commissioners who had ruled on this point, and this revealed that Commissioner Woodside was participating in this matter despite his previous responsibility for the Division of Corporation Finance's investigation of the matter.

Petitioner immediately moved thereupon that the Commission either discontinue the proceeding, or, in the alternative, hold a hearing to determine upon an evidentiary record whether or not a Commissioner should be disqualified from further participation in the proceeding against R. A. Holman & Co. The Commission, however, failed to take any action on the merits of this motion (JA 12, 68). The Court of

Appeals below noted in its opinion that the Commission has held that it does not have authority to pass on the qualifications of its members. (See p. 8a, fn. 7, *infra*.)

By reason of the Commission's failure to take any action on petitioner's claim of disqualification, petitioner filed its complaint in the District Court below, as heretofore noted, and the District Court, after hearings, issued a preliminary injunction. The District Court's order recited that the preliminary injunction had been granted because of Commissioner Woodside's responsibility for the processing of the registration statement, without regard to his personal participation in the matter.

The defendants below appealed the District Court's order and sought an initial hearing *en banc* before the Court of Appeals by reason of the importance of the issues presented. The appeal was heard by a three-judge panel of the Court of Appeals below which, on June 13, 1963, reversed the District Court (Opinion by Judge Burger). In its decision, the Court below distinguished its prior decision in *Amos Treat* on the ground that there "the Commission did not deny plaintiff's allegations of the claimed disqualifying factors," (p. 6a, *infra*) whereas here, the Commission had denied Commissioner Woodside's participation in the matter. By reason of this denial, the Court ruled that the petitioner's challenge "should be adduced in the first instance at the administrative level." It held that its consideration of petitioner's claim would be delayed until the judicial review following completion of the administrative proceedings "when the administrative record reaches us in due course." At that time only, the Court held that it would review the issue of disqualification, albeit "with great care." (See p. 7a.)

REASONS FOR GRANTING THE WRIT

This case presents important and timely issues concerning the proper exercise of the Federal District Court's equitable jurisdiction to redress an agency's denial of procedural due process to parties in its proceedings. The case provides an appropriate opportunity to resolve the conflict between the Court of Appeals for the District of Columbia on the one hand and the Courts of Appeals for the Second and Ninth Circuits on the other regarding the showing required to invoke such jurisdiction.

I. THE SERIOUS DEPRIVATION OF DUE PROCESS INVOLVED.

At the outset, we note that this case involves a matter of procedural due process of the most fundamental nature; namely, the propriety of the participation by an official of an administrative agency first as a participant in an investigation by an agency of a matter and then as an agency member making decisions in a formal adjudicatory proceeding, involving the same matter, which proceeding is considering the imposition of serious penalties against a party.

This dual participation is prohibited in absolute terms by Section 5(*c*) of the Administrative Procedure Act, 5 U.S.C. § 1004(*c*) (p. 10a, *infra*). Even more important, the Court of Appeals below has recognized that such participation is incompatible with minimal due process requirements in its opinion in *Amos Treat & Co.* v. *Securities and Exchange Commission*, *supra*, involving a similar revocation proceeding by the Commission against an underwriter. There, in granting the same equitable relief ordered by the District Court below in this case, the Court expressly noted that this dual participation constituted a "situation where the asserted infirmity is *fundamental*. . . ." (306 F. 2d at 265 (emphasis supplied)). And as the Court further elaborated:

"* * * It is not enough that here no corruption has been charged, indeed appellants expressly disclaim personal bias and prejudice. What must control is the policy this court has previously applied and the principles, discernible from the cases and from the statute, that *the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function.*

* * * *

"Enough has been said to demonstrate the basis for our conclusion that an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness *but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.*" (306 F. 2d at 265, 267) (Emphasis supplied)

This ruling was clearly compelled by the decisions of this Court and by applicable constitutional doctrines of fairness. *In re Murchison*, 349 U.S. 133, 136-37 (1955). Cf. *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339, 343-344 (1913).

II. THE UNSOUNDNESS OF THE DECISION BELOW AND THE CONFLICT WITH THE POSITIONS OF THE SECOND AND NINTH CIRCUITS.

In the present case, notwithstanding the gravity of the infraction of due process resulting from such participation, the Court of Appeals has held that the District Court is powerless to grant relief if the agency denies the facts upon which the claim of infraction is based. The Court below reached this result even though the District Court had determined that petitioner had made a sufficient showing to warrant the grant of a preliminary injunction and the holding of an evidentiary hearing with respect to petitioner's charges; in-

deed, the Court of Appeals itself noted below that petitioner's claims were substantial enough to warrant scrutiny "with great care" at the time the case eventually reached them upon review of the Commission's final order.

In short, the Court below has ruled that the District Court cannot exercise its traditional powers and determine the true facts even where petitioner has made a *prima facie* showing of a procedural irregularity raising basic constitutional questions. In the Court of Appeals' view, the District Court's jurisdiction to redress these "fundamental infirmities" is restricted to those circumstances where an administrative agency is candid and admits in its pleading the essential factual allegations relating to the disqualification of a member or to other due process defects.

The Court has thus adopted a jurisdictional rule under which the availability of relief from the District Court will be dependent exclusively on the pleading position taken by the administrative agency's counsel in the court suit, without further investigation of the facts. Not only is this improper, but its effect will plainly be to preclude the District Court from granting equitable relief in almost all cases.

The view of the Court of Appeals for the District of Columbia Circuit of the District Court's jurisdiction in these matters is in conflict with positions taken by the Courts of Appeals for the Second and Ninth Circuits. Thus, in *Empresa Hondureña de Vapores, S. A.* v. *McLeod*, 300 F. 2d 222, 228 (1962), *vacated without decision* 372 U.S. 10 (1963), and in *Fay* v. *Douds*, 172 F. 2d 720, 723 (1949), the Second Circuit has ruled that a district court has proper jurisdiction to entertain an

action to enjoin an administrative proceeding where an assertion is made, "not transparently frivolous, that failure to enjoin would deny rights guaranteed by the Constitution" (*ibid.*).

Similarly, in *Federal Home Loan Bank Board* v. *Long Beach Federal Savings and Loan Association*, 295 F. 2d 403 (9th Cir. 1961), the Ninth Circuit upheld the jurisdiction of the district court to determine the qualifications of a hearing examiner conducting an administrative proceeding. The Court of Appeals there made its investigation of the facts and disqualified the examiner, justifying its action as necessary to protect the parties to the proceeding from being required to complete a long administrative proceeding, under circumstances where no valid final order could be issued.

We submit that these decisions by the Second and Ninth Circuits set forth the proper view of the District Court's jurisdiction to protect constitutional rights of parties to administrative proceedings. In contrast, the decision below in this case provides wholly unworkable and unsound standards for invoking this jurisdiction and should not be permitted to stand.

THE INADEQUACY OF EXISTING ADMINISTRATIVE REMEDIES AFFORDED PETITIONER.

The Court below directs petitioner to exhaust his administrative remedies by having its claim considered by the agency in the pending administrative proceedings and then examined by the court upon judicial review of the entire record under the statutory review procedures. It imposes this procedure on petitioner notwithstanding its prior ruling in *Amos Treat* that statutory review procedures were not adequate and that the claim of disqualification is appropriate for immediate court review. However, the fact that the agency

did not concede the dual participation, as in *Amos Treat*, plainly does not now make these remedies adequate.

First: The Court below subjects petitioner, although deprived of fundamental procedural safeguards affecting substantial rights, to needless injury and expense since it delays judicial review of his claim until the end of the administrative proceedings and makes vindication of his rights dependent on subsequent review proceedings. If his challenge is then successful, he thereafter is forced to expend further time and expense in the participation of a new proceeding covering the entire matter again. Thus, it is plain that if petitioner's claim is valid, then the refusal of the Court to entertain it can only result in further protracted proceedings.

Second: Beyond this expense and injury, the course of action proposed by the Court below provides petitioner with an inadequate remedy to test the matter. For petitioner to press a claim of disqualification in the administrative proceeding may very well be an exercise in futility. As the opinion of the Court below stated (p. 8a, fn. 7, *infra*):

> "The Securities and Exchange Commission has held that it does not have authority to pass on a challenge to qualifications of one of its members and that each member must resolve the issue for himself. Otis & Co., 31 S.E.C. 380 (1950)."

Moreover, as previously noted, the Commission has already declined to pass on the qualifications of Commissioner Woodside in its proceedings despite petitioner's timely raising of the matter. See pp. 7-8, *supra*. What, then, is there to be reviewed by the statutory procedures if the agency itself does not pass on the matter?

Third: The wisdom of prompt judicial consideration of petitioner's claims by the District Court is manifest here. The decision below, while on its face appearing favorable to administrative agencies, may not be necessarily so. It forces administrative agencies into the awkward position of having qualifications of their commissioners considered initially by subordinate hearing examiners; during the usually long period of administrative proceedings, it deprives the agency of an "appearance of regularity and fairness" in the conduct of its affairs, which the Court below in *Amos Treat* acknowledged was of primary importance.

In these circumstances, the general requirement that administrative remedies must be exhausted as a prerequisite to judicial relief plainly has no application. This rule is premised on the theory that agencies ought to have the right to pass on the claims of illegality and unconstitutionality raised by a party before judicial consideration of these claims is permissible. See, e.g., *Myers* v. *Bethlehem Shipyards*, 303 U.S. 41, 50 (1938). But, as noted in the present case, the agency regards itself as powerless to pass on the claims of qualifications of its members. Significantly, we also note in *Myers* v. *Bethlehem Shipyards*, *supra*, that this Court was careful to point out in holding that exhaustion was required, that "there is no claim by the corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal." See 303 U.S. at 47.

We submit that the exhaustion doctrine should not immunize an administrative agency from being called to account by the District Court where it causes irreparable injury by improper conduct unrelated to the substantive aspects of the proceedings involved or to the agency's jurisdiction. This is particularly true where

the claim of impropriety relates to such a fundamental consideration as the qualifications of a member sitting in judgment of a proceeding involving matters of serious consequence to the party.

In all events, this Court has held that where an administrative agency is exercising a power not granted by Congress to the serious deprivation of a party, the district courts are not required to stand idly by because of the existence of a statutory review procedure which permits review of the agency's final order. See, e.g., *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Similarly, as this Court has also noted, where an agency's proceeding raises international problems, "prompt judicial resolution of the controversy" may be appropriate. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). See also, *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961). In these cases, the touchstone permitting the exercise of generally equitable jurisdiction is the adequacy of the statutory remedy to protect substantial rights. Where the remedy is inadequate, as here, the district court has proper jurisdiction to entertain the action.

IV. THE APPROPRIATENESS OF THIS COURT'S REVIEW.

The issues in this case present a timely opportunity for this Court to consider matters of substantial import regarding the circumstances under which the federal district courts may entertain suits to restrain unconstitutional agency action. Such consideration is particularly warranted in view of the conflicting positions taken by the Court of Appeals for the District of Columbia Circuit and the Second and Ninth Circuits with respect to the proper scope of the jurisdiction of the district court in this regard.

There is no governing Supreme Court precedent dealing with the question of the showing which must

be made by a party in order to invoke the district court's jurisdiction. The different results reached by the Court of Appeals in the *Amos Treat* case and the present case and the conflict with other circuits demonstrate the need for this Court to establish more definitive standards for guidance of the lower federal courts.

We submit that the ruling below is unsound in that it makes the district court's jurisdiction in a matter involving fundamental due process considerations dependent on the extent of the agency's concession of the facts upon which the claim of deprivation is based. This constitutes judicial abdication of its responsibilities. If the district court has jurisdiction to entertain these actions, it must be permitted to ascertain the facts where a substantial claim of deprivation of due process is made. Only review of this case by this Court can clarify this important matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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RICHARD A. HOLMAN

Dated: September 27, 1963.

APPENDIX A

Preliminary Injunction Granted by District Court Below

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1888-62

R. A. HOLMAN & CO., INC., *Plaintiff*,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL., *Defendants*.

PRELIMINARY INJUNCTION

This cause came on to be heard upon the motion of plaintiff for preliminary injunction on the verified complaint, the exhibits thereto, and the affidavits of Stanley D. Halperin, dated June 11, June 15 and June 25, 1962; and upon defendants' verified answer and exhibits thereto, the affidavit of Robert LaPrade, dated June 12, 1962, and affidavit of Charles Eisenhart, dated June 13, 1962, and after argument by counsel for both sides in open Court.

And this Court having found that the defendant Woodside participated as a Commissioner in determinations in the consolidated proceeding pending before the Securities and Exchange Commission entitled "*In the Matter of Pearson Corporation*, File No. 24B-1077 and *In the Matter of R. A. Holman & Co., Inc.*, File No. 8-6859" and that previously while Director of the Commission's Division of Corporation Finance he had had responsibility for the processing of a registration statement of Pearson Corporation, a related matter; and without regard to whether he personally participated in such processing;

And the Court makes reference to the transcript of the hearing on the motion for preliminary injunction including the remarks of the Court therein;

And it appearing to the satisfaction of the Court, on the basis of Count 1 of the complaint only and of the decision

of the Court of Appeals in *Amos Treat and Co.* v. *Securities and Exchange Commission* (No. 17,002, Dec. May 11, 1962), that pending the further order of this Court the issuance of a preliminary injunction is appropriate in the circumstances, it is by the Court, this 6th day of July, 1962,

1. Adjudged and Ordered, that until further order of the Court and pending final hearing of this case, the defendants, Securities and Exchange Commission, the individual defendants, and their officers, agents, employees and attorneys of every kind, be and they hereby are restrained from further conduct of the consolidated proceedings pending before the Securities and Exchange Commission entitled "*In the Matter of Pearson Corporation*, File No. 24 B-1077" and "*In the Matter of R. A. Holman & Co., Inc.*, File No. 8-6859."

2. The Securities and Exchange Commission is directed to show cause on or before September 5, 1962 why a permanent injunction shall not be entered, and it shall be a sufficient response if the Commission in the alternative shall:

(a) Within the period specified for response to the Show Cause Order, advise the Court that the Commission has instituted a full evidentiary hearing for the purpose of determining upon a complete record whether or not any Commissioner because of prior staff service should have been disqualified for the reasons discussed in the opinion of the Court of Appeals in Amos Treat & Co. v. Securities and Exchange Commission (No. 17,002, dec. May 11, 1962), and the Commission shall thereafter submit a full report and the record upon which it is based to the Court; or

(b) Within the period specified for response to the Show Cause Order, advise the Court that the Commission has terminated the consolidated proceedings against the plaintiff entitled "In the Matter of Pear-

son Corporation, File No. 24 B-1077" and "In the Matter of R. A. Holman & Co., Inc., File No. 8-6859"; and it is

FURTHER ORDERED that this shall be without prejudice to the institution of new proceedings against plaintiff by the Securities and Exchange Commission, if it be so advised, in lieu of the present proceedings; *provided* that neither in the institution of such new proceedings nor in any subsequent aspect thereof shall Commissioner Byron D. Woodside participate. However, in such new proceedings, if any, the Commission may utilize and consider all material gathered and recommendations submitted by the Division of Corporation Finance, in conformity with the opinion of the Court of Appeals in *Amos Treat & Co. v. S.E.C.* (No. 17,002, dec. May 11, 1962); and it is

FURTHER ORDERED that should the Securities and Exchange Commission file a notice of appeal from this order that the time for response to the show cause order contained herein is extended to and including thirty days from the date on which the appellate proceedings are terminated.

s/ HART
Judge

No objection as to Form:
Bond Waived:

s/ DAVID FERBER
Counsel for Defendants

s/ MILTON FREEMAN
Counsel for Plaintiff

Opinion of Court of Appeals Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17202

SECURITIES AND EXCHANGE COMMISSION,
WILLIAM L. CARY, ET AL., APPELLANTS,

v.

R. A. HOLMAN & COMPANY, INC., APPELLEE.

Appeal from the United States District Court
for the District of Columbia

Decided June 13, 1963

Mr. David Ferber, Associate General Counsel, Securities and Exchange Commission, with whom *Messrs. Donald R. Jolliffe* and *Michael Joseph*, Attorneys, Securities and Exchange Commission, were on the brief, for appellants.

Mr. Milton V. Freeman, with whom *Mr. Edgar H. Brenner* was on the brief, for appellee.

Before BAZELON, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: The Securities and Exchange Commission appeals from an order of the District Court granting a preliminary injunction[1] against the Commission from further conduct of certain proceedings pending before it relating to the issuance and sale of 175,000 shares of stock of Pearson Corporation as issuer of which ap-

[1] The proceedings now subject to restraint under the District Court's preliminary injunction are the same proceedings this court dealt with in R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 112 U.S. App. D.C. 43, 299 F. 2d 127 (1962), *cert. denied*, 370 U.S. 911. There the Commission found cause to believe that the offering of Pearson Corporation stock "would operate as a fraud and deceit upon the purchasers" due to untrue statements of material facts and material omissions.

pellee R. A. Holman & Co., Inc., was underwriter. The District Court granted the injunction on the claim that one of the members of the Commission was disqualified from acting in an adjudicatory capacity in an administrative proceeding involving appellee because the Commissioner had previously been chief of a division with responsibility for the processing of registration statements, including the registration statement filed by Pearson Corporation which is the subject of the pending hearing.

The order appealed from enjoined further administrative proceedings in which appellee is respondent. In the complaint it was claimed by appellee that two Commissioners were disqualified from conducting adjudicatory proceedings because of prior staff service.[2] On the record before us only the alleged disqualification of Commissioner Woodside is in issue, Commissioner Cohen having taken no part. The District Court while observing that an injunction would "put a tremendous hardship on the S.E.C. . . ." concluded that appellant's claim of the applicability of *Amos Treat & Co. v. Securities and Exchange Commission*, 113 U.S.App.D.C. 400, 306 F.2d 260 (1962),[3] was well founded and with obvious reluctance the Court granted an injunction.

In the District Court appellee contended first that Commissioner Woodside's position of responsibility while a member of the staff was sufficient to disqualify him even though he did not in fact participate in the investigation

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[2] Commissioner Cohen, a former staff member, was shown to have taken no part as a Commissioner except to act on a motion for a continuance.

[3] The *Amos Treat* case was heard by a motions division on a motion to stay the order of the District Court which denied a preliminary injunction to stop revocation proceeding. Appeal on the merits was then consolidated with hearing on the motion and the case was disposed of forthwith.

or recommendations affecting appellee; second appellee contended that if disqualification did not result automatically from the fact that Woodside had a responsibility as a director of the unit, then the District Court was bound to conduct an evidentiary hearing in which the Commission would be required to demonstrate exactly the nature and extent of Woodside's involvement in the steps which led to the Commission's proposed hearing. In the *Amos Treat* case the Commission did not deny plaintiff's allegations of the claimed disqualifying factors. In the instant case the affidavits filed on behalf of the Commission affirmatively assert there was no participation by Woodside in processing Holman's application or the recommendations by the Staff to the Commission to conduct a hearing. The Commission argues that this case is therefore factually distinguishable from the *Amos Treat* case. We agree.

The basis on which this court acted in the *Amos Treat* case is summarized in that opinion:

> We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency. So to hold, in our view, would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed. 306 F.2d 266-67.

Accordingly it will be seen that we emphasized that the District Court's jurisdiction in that case rested solely on due process grounds, so clearly established on the record made there. (306 F.2d at 267 and see *Wong Yang Sun* v. *McGrath*, 339 U.S. 33, 45 (1950)). We were satisfied that

the petitioner had presented "the exceptional case" which entitled it to relief. Despite the broad and sweeping claims which the appellee now makes for the *Amos Treat* case, we see nothing on this record to require that the proceedings before the Commission be suspended. "For the present purpose it is sufficient to hold and we do hold, that the petitioner may constitutionally be required to present all the pertinent facts in the prescribed administrative proceedings and may there raise, and ultimately may present for judicial review, any legal question which may arise as the facts are developed."[5]

We are satisfied that such claims as the appellant has here presented should be adduced in the first instance at the administrative level and any challenge to the resolution of these issues is subject to judicial review when the administrative record reaches us in due course. In *Trans World Airlines v. Civil Aeronautics Board*, 102 U.S. App. D.C. 391, 254 F.2d 90 (1958), we indicated that at that stage we will scrutinize the issue of disqualification with great care. The administrative proceedings cannot be stopped to allow for excursions in the courts with prolonged evidentiary hearings; the time for that in a proper case is when an aggrieved litigant seeks judicial review of agency action having preserved the point of claimed disqualification in the administrative hearing. The party asserting disqualification must make his record in the administrative hearing. While the scope and nature of that inquiry has never been fully delineated it must be sufficient to allow the challenging party to introduce whatever relevant evidence he possesses bearing on disqualification since he, of course, has the burden of proof. To stay the

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[5] Columbia System v. United States, 316 U.S. 407, 425 (1942); Farmer v. United Electrical, Radio & Machine Wkrs., 93 U.S. App. D.C. 178, 181, 211 F.2d 36, 39, 40 (1953), *cert. denied*, 347 U.S. 943 (1954); cf. Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 277 (1933).

[6] Anniston Mfg. Co. v. Davis, 301 U.S. 337, 353 (1937).

administrative processes while a court was engaged in an extended inquiry into the claimed disqualification of members of the administrative body could lead to a breakdown in the administrative process which has long been criticized for its slow pace.

We pointed out recently in *The Wolf Corporation* case[6] that Congress, in vesting broad powers in regulatory agencies, was not unaware of possible risks but "except in very unusual and limited circumstances Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of power by *prior* restraint . . ." to stay the administrative process. This case does not present claims warranting judicial intervention before the regulatory agency has completed its processes. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

Congress has made no specific provisions for considering challenges of disqualification addressed to members of regulatory or administrative agencies acting as such, as it has, for example, concerning hearing examiners, Section 7(a) of the Administrative Procedure Act,[7] 5 U.S.C. §

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[6] The Wolf Corporation v. Securities and Exchange Commission, No. 17355, D.C. Cir., Feb. 14, 1963.

[7] Prior to the enactment of the Administrative Procedure Act, the Federal Communications Commission acting as a body held that it could prevent one of its members from sitting even over his objection. In the matter of Segal and Smith, 5 F.C.C. 3 (1937). The Securities and Exchange Commission however has held that it does not have authority to pass on a challenge to qualifications of one of its members and that each member must resolve the issue for himself. Otis & Co., 31 S.E.C. 380 (1950); The United Corporation, 32 S.E.C. 633 (1951); *cf.* Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F. 2d 461 (2d Cir. 1959) where that court (per Judge Lumbard) cautioned against actions which would impair the Commission's "reputation for objectivity and impartiality." In the *Gilligan* case appellant argued that the Commission's bias and prejudgment was a denial of due process. See interesting treatment, GELHORN & BYSE, ADMINISTRATIVE LAW, 4th Ed., 935-950; 2 DAVIS, ADMINISTRATIVE LAW TREATISE, 162-170.

1006(a), and also United States District Judges, 28 U.S.C. § 144. See 28 U.S.C. § 455. The Third Circuit has held that the National Labor Relations Board was required to consider evidence on the issue of disqualification of one of its members. *Berkshire Employees Ass'n* v. *National Labor Relations Board*, 121 F.2d 235 (3d Cir. 1941). This court, confronted with a claim of prejudgment attributed to the Attorney General, said: "We cannot assume in advance of a hearing that a responsible officer of the Government will fail to carry out his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it." *National Lawyers Guild* v. *Brownell*, 96 U.S.App. D.C. 252, 225 F.2d 552, 555 (1955), *cert. denied*, 351 U.S. 927 (1956). The bare contention of lack of due process does not operate to relieve the appellant from the requirement that he exhaust administrative remedies. *Franklin* v. *Jonco Aircraft Corp.*, 346 U.S. 868 (1953).

Reversed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption omitted]

Order Denying Rehearing

Before: BAZELON, *Chief Judge*, and WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT and MCGOWAN, *Circuit Judges*, in Chambers.

ORDER

On consideration of appellee's petition for rehearing en banc, it is

ORDERED by the court that the petition is hereby denied.

PER CURIAM:

Dated: Aug. 1, 1963

Circuit Judge WILBUR K. MILLER would grant the petition.

APPENDIX B

Fifth Amendment of the United States Constitution

No person shall . . . be deprived of life, liberty or property without due process of law.

Section 5(c), Administrative Procedure Act, 5 U.S.C. § 1004(c)

(c) . . . No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. . . .